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RICHARD STEVEN TRELA
100 PIERCE ST # 1101
CLEARWATER FL 33756

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FEB 03 2005

OFFICE OF PETITIONS

In re Application of :
Richard Steven Tyler :
Application No.10/720,043 :
Filed: November 20, 2003 :
Title of Invention: Anti Terrorist and Homeland :
Security Public Safety Warning System :

ON PETITION

This is a decision on the petition filed January 3, 2005 under 37 CFR 1.137(a).

The petition to revive under 37 C.F.R. § 1.137(a) is **DISMISSED**.

Any request for reconsideration must be submitted within **TWO (2) MONTHS** from the mail date of this decision. Extensions of time under 37 C.F.R. § 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 C.F.R. § 1.137(a)." This is **not** a final agency action within the meaning of 5 U.S.C. § 704.

This application became abandoned for failure to timely submit a response to the Notice to File Corrected Application Papers "Notice" mailed February 27, 2004. The notice set an extendable 2 month period for reply. No extensions of time pursuant to 37 CFR 1.136(a) were obtained. Accordingly, this application became abandoned on April 27, 2004. A Notice of Abandonment was mailed on December 2, 2004.

Petitioner asserts that the Notice to File Corrected Application Papers mailed on February 27, 2004 was never received.

Petition to revive under 37 CFR 1.137(a)

A grantable petition under 37 C.F.R. § 1.137(a) must be accompanied by:

- (1) the required reply,¹
- (2) the petition fee,
- (3) a showing to the satisfaction of the Director that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unavoidable, and
- (4) a terminal disclaimer and fee if the application was filed on or before June 8, 1995 or if the application is a design application.

The instant petition lacks items (1) and (3).

As to item (1), applicant has failed to provide the required corrected application papers.

As to item (3), the showing of record is not sufficient to establish to the satisfaction of the Director that the delay was unavoidable within the meaning of 37 C.F.R. § 1.137(a).

The Office may revive an abandoned application if the delay in responding to the relevant outstanding office requirement is shown to the satisfaction of the Commissioner to have been "unavoidable." See, 37 C.F.R. § 1.137(a)(3). Decisions on reviving abandoned applications have adopted the reasonably prudent person standard in determining if the delay was unavoidable. Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (Comm'r Pat. 1887) (the term "unavoidable" is applicable to ordinary human affairs, and requires no more greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business."); In re Mattullath, 38 App. D.C. 497, 514-15 (D.C. Cir. 1912); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (Comm'r Pat. 1913). In addition, decisions on revival are made on a "case by case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). A petition to revive an application as unavoidably abandoned cannot be granted where petitioner has failed to meet his or her burden of establishing the cause of the unavoidable delay. Haines v. Quigg, 673 F. Supp. 314, 5 USPQ2D 1130 (N.D. Ind. 1987).

A review of the record indicates no irregularity in the mailing of the Notice, and in the absence of any irregularity in the mailing, there is a strong presumption that the Office action was properly mailed to the address of record. This presumption may be overcome by a showing that the Notice was not in fact received. The showing required to establish the failure to receive an Office communication must include a statement from the practitioner stating that the Office communication was not received by the practitioner and attesting to the fact that a search of the file jacket and docket records

¹ In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof.

indicates that the Office communication was not received. A copy of the docket record where the non-received Office communication would have been entered had it been received and docketed must be attached to and referenced in practitioner's statement.² The showing outlined above may not be sufficient if there are circumstances that point to a conclusion that the Notice to file Corrected Application Papers may have been lost after receipt rather than a conclusion that the Notice to File Corrected Application Papers was lost in the mail.

Where applicant is pro se applicant should demonstrate what system is in place upon receipt of communication from the USPTO. If applicant retains documents in a central location, makes use of a computer program or calendar such information as well as any accompanying evidence should be provided on renewed petition. A pro se applicant must state that the file was searched and that the communication in question has not been located. The Office is looking for applicant to make a showing that the communication was not lost after receipt.

Petitioner has not presented evidence which would establish non receipt of the Office Communication. On renewed petition, petitioner may wish to describe what if any system is in place for the receipt of mail from the USPTO. As the required showing has not been presented, the petition must be dismissed.

Alternative Venue

Petitioner may wish to consider filing a petition to revive based on unintentional abandonment under 37 CFR 1.137(b). A grantable petition pursuant to 37 C.F.R. § 1.137(b) must be accompanied by the required reply, the required petition fee, and a statement that the **entire** delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 C.F.R. § 1.137(b) was unintentional.

The filing of a petition under 37 C.F.R. § 1.137(b) cannot be intentionally delayed, and therefore, must be filed promptly. A person seeking revival due to unintentional delay cannot make a statement that the delay was unintentional unless the entire delay, including the delay from the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 C.F.R. § 1.137(b), was unintentional. A statement that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 C.F.R. § 1.137(b).

A courtesy copy of the Notice of Corrected Application Papers is enclosed for petitioner's convenience.

²M.P.E.P. § 711.03©); See Notice entitled "Withdrawing the Holding of Abandonment When Office Actions Are Not Received," 1156 O.G. 53 (November 16, 1993).

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petition
 Commissioner for Patents
 P.O. Box 1450
 Alexandria, VA 22313-1450

By facsimile: (703) 872-9306

By delivery service: U.S. Patent and Trademark Office
(FedEx, UPS, DHL, etc.) Randolph Building
 401 Dulany Street
 Alexandria, VA 22314

Telephone inquiries should be directed to the undersigned at (571) 272-3215.



Charlema R. Grant
Petitions Attorney
Office of Petitions

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